IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

(Wheeling Division)

CHARLES C. CUMPTAN and DEBORAH V. CUMPTAN,

Plaintiffs, **CIVIL ACTION NO.: 5:10-CV-00012**

VS.

ALLSTATE INSURANCE COMPANY, and LARRY D. POYNTER, individually, and ED STEEN, individually,

Defendants.

DEFENDANTS LARRY D. POYNTER AND ED STEEN'S MEMORANDUM OF LAW SUPPORTING AMENDED MOTION TO DISMISS

COME NOW the Defendants, Larry D. Poynter and Ed Steen (the "Adjuster Defendants"), by and through their counsel, Walter M. Jones, III, Michael M. Stevens and Martin & Seibert, L.C., and respectfully move for an Order dismissing plaintiffs' lawsuit as against them.[1]

As discussed below, plaintiffs' UTPA, bad faith, fraud and deceit claims against the Adjuster Defendants fail as a matter of law because they are time-barred. In addition, plaintiffs' bad faith claim against the Adjuster Defendants fails because these Defendants are not, and are not alleged to be, parties to the insurance contract between plaintiffs and Allstate. Plaintiffs' claims also fail as to the Adjuster Defendants because the Complaint is devoid of any allegations of specific contact between plaintiffs and

[1] The Amended Motion to Dismiss and accompanying Memorandum of Law are filed pursuant to leave granted by this Court in its Memorandum Opinion and Order of September 23, 2010.

these Defendants. Finally, plaintiffs' lawsuit against the Adjuster Defendants should be dismissed, pursuant to Fed. R. Civ. P. 41(a), based on the "two-dismissal rule."

ALLEGATIONS OF THE COMPLAINT

Plaintiffs allege they were injured in an automobile accident caused by an underinsured motorist on May 27, 1988 in Cabell County, West Virginia. (Complaint, ¶ 6.)[2] According to plaintiffs, at the time of the accident they were insured by an automobile policy issued by Allstate, which applied to three separate vehicles and had a UIM coverage limit of $100,000 per person and $300,000 per accident. (*Id.*, ¶ 10.) Plaintiffs allege their bodily injury claims exhausted the tortfeasor's bodily injury liability coverage applicable to the subject accident. (*Id.*, ¶ 9.)

Plaintiffs further allege their Allstate insurance policy did not contain language prohibiting stacking of UIM coverage. (*Id.*, ¶ 11.) According to plaintiffs, the defendants recognized the policy "did not include what is commonly referred to as 'anti-stacking' language which otherwise may have prohibited policyholders, insureds and claimants from stacking the available [UIM] coverage benefits applicable to all three vehicles covered under the policy." (*Id.*, ¶ 12.) Plaintiffs allege the defendants fraudulently concealed from them the existence of stacked UIM coverage and that they relied on defendants' representation that the UIM limit available to them as a result of the subject accident was $100,000. (*Id.*, ¶¶ 14-15.) Plaintiffs further allege that, as a result of this fraudulent concealment, they accepted a total of $100,000 as "full and final settlement"

[2] A copy of the Complaint as filed in the Circuit Court of Marshall County, West Virginia and subsequently removed to this Court was attached as Exhibit "A" to the Adjuster Defendants' Memorandum of Law in Support of Motion to Dismiss as filed on January 29, 2010 (Docket No. 7) with said exhibit incorporated herein by reference.

of their UIM claim, instead of seeking an additional $200,000, because they "did not know about the additional coverage Allstate was concealing." (*Id.*, ¶ 16.)

Plaintiffs allege the Adjuster Defendants' conduct violated the West Virginia Unfair Trade Practices Act and related insurance regulations, resulted in unjust enrichment to Allstate,[3] and constituted deceit, fraud and bad faith. (*Id.*, ¶¶ 19, 20, 21, 22, 24.) All plaintiffs' claims against the Adjuster Defendants fail as a matter of law and should be dismissed.

ARGUMENT

I. PLAINTIFFS' UTPA, BAD FAITH, FRAUD AND DECEIT CLAIMS ARE TIME BARRED.

Plaintiffs' claims for purported violations of the UTPA, bad faith, fraud and deceit are time-barred. Plaintiffs' UTPA and bad faith claims are subject to a one-year limitations period. *See, e.g., Wilt v. State Auto. Mut. Ins. Co.,* 203 W. Va. 165, 167-71, 506 S.E.2d 608, 611-14 (1998) (stating "[c]laims involving unfair settlement practices that arise under the Unfair Trade Practices Act . . . are governed by the one-year statute of limitations" in W. Va. Code § 55-2-12(c), and noting same statute applies to torts [*e.g.,* common law tort of bad faith]); *Noland v. Virginia Ins. Reciprocal,* 686 S.E.2d 23, 33 (W. Va. 2009) (citing *Wilt* for principle that one-year limitations period applies to common law bad faith claims); *Casto v. Northwestern Mut. Life Ins. Co.,* 2009 WL 2915132, at *2 (S.D. W. Va. Sept. 2, 2009) (dismissing UTPA claim on the ground that it

[3] The unjust enrichment claim is asserted against Allstate only, so will not be addressed in this Motion.

was barred by the one-year limitations period applicable to such claims).[4] The two-year limitations period set forth in W. Va. Code § 55-2-12 applies to plaintiffs' fraud and deceit claims. *See, e.g., Brown v. Community Moving & Storage, Inc.,* 193 W. Va. 176, 178 n. 3, 455 S.E.2d 545, 547 n. 3 (1995) (*per curiam*) ("The two-year statute of limitations period set forth in W. Va. Code § 55-2-12, is applicable to the fraud claim"); *Wilt,* 203 W. Va. at 170, 506 S.E.2d at 613 (two-year limitations period applies to claims for fraud and deceit).

Here, plaintiffs allege they were injured in an accident with an underinsured motorist on May 27, 1988 – *i.e.,* ***more than 20 years ago***. Plaintiffs allege that, as a result of the Adjuster Defendants' purported misconduct, they accepted $100,000 in UIM coverage (as opposed to the stacked coverage to which they claim they were entitled) as "full and final settlement" of their UIM claim. (Complaint, ¶¶ 14-16.) Not surprisingly, plaintiffs do not allege that any of their purported causes of action accrued within the applicable one- to two-year limitations periods. Indeed, it is clear from the face of the Complaint – relating to the Adjuster Defendants' handling of a claim arising from a **1988** accident – that all the limitations periods would have run long ago.

Moreover, it is clear from the Complaint allegations that plaintiffs knew, or by the exercise of reasonable diligence should have known, of their causes of action well within the applicable limitations period. Accordingly, plaintiffs are not entitled to the benefit of the discovery rule. *See, e.g.,* Syl. Pt. 4, *Gaither v. City Hosp., Inc.,* 199 W. Va. 706, 487 S.E.2d 901 (1997) ("under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence,

[4] Copies of unpublished decisions cited herein were previously attached as Exhibit "B" to the Adjuster Defendants' Memorandum of Law in Support of Motion to Dismiss as filed on January 29, 2010. (Docket No. 7) with said exhibit incorporated herein by reference.

should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury"); Syl. Pt. 3, *Dunn v. Rockwell,* -- S.E.2d --, 2009 WL 4059061 (W. Va. Nov. 24, 2009) (*quoting Gather* for same principle). Here, under plaintiffs' theory that they were entitled to stacked UIM coverage, they clearly knew or should have known that they had been injured and who supposedly caused that alleged injury when their claim was fully and finally settled for non-stacked UIM coverage in the amount of $100,000. Obviously, in connection with an accident that occurred 20 years ago, this would have happened well within the applicable one- and two-year limitations periods.

The crux of all plaintiffs' claims is that the Adjuster Defendants supposedly fraudulently represented that plaintiffs were entitled to only $100,000 in UIM coverage, and fraudulently concealed from them that they were entitled to stacked UIM coverage. Yet, plaintiffs expressly allege that their insurance policy contained *no* anti-stacking provisions which would have otherwise prohibited the stacking of UIM coverage for the three vehicles covered under the policy. (Complaint, ¶ 12.) Plaintiffs, therefore, needed only to have access to their own insurance policy to discover their alleged cause of action. And, significantly, plaintiffs do not allege they did not have or could not have obtained access to that policy. Moreover, the Complaint's express acknowledgment (Complaint, ¶¶ 10-11) that plaintiffs allegedly received a policy that contained nothing precluding stacking of UIM coverage negates any allegation that the Adjuster Defendants somehow "fraudulently concealed" the availability of stacked coverage from plaintiffs, since those Defendants certainly did not prevent, and are not alleged to have prevented plaintiffs from reviewing the policy to which they admit they had access.[5]

Courts have recognized that there can be no fraudulent concealment of the terms of a contract where, as here, the plaintiff does not or cannot allege the defendant concealed the contractual terms or prevented the plaintiff from discovering them. For example, in *Skinner v. USAble Life*, 200 F. Supp. 2d 636 (D. Miss. 2001), the plaintiffs alleged the defendant insurer, USAble Life, and certain of its agents, misrepresented the terms of long-term disability coverage sold by the defendant. USAble Life argued that the non-diverse agent defendants were fraudulently joined because, among other things, the plaintiffs' claims were time-barred. The court rejected the argument that the limitations periods were tolled because the defendants fraudulently concealed the terms of the coverage from them. In so ruling, the court explained that the plaintiffs had in their possession a certificate of insurance and brochure which set forth the scope of the coverage. As a result, the plaintiffs either knew or should have known through the exercise of reasonable diligence that the agents' alleged representations regarding the coverage were false. *Id* at 639-40. The plaintiffs' possession of policy documents containing the terms of the coverage defeated any claim of fraudulent concealment. *Id.*

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[5] West Virginia case law holding that an insured is not presumed to know the contents of an insurance policy is irrelevant here. *See, e.g., Murray v. State Farm Fire and Cas. Co.*, 203 W. Va. 477, 491, n. 15, 509 S.E.2d 1, 15 n. 14 (1998). The Adjuster Defendants are not arguing an imputed knowledge theory. The point is that there can be no fraudulent concealment of a policy term when the insured clearly has access to the policy and the defendant has done nothing to prevent such access. In all events, as discussed *infra*, plaintiffs are presumed to know the law, the Adjuster Defendants certainly did not, and could not, have concealed from plaintiffs the case law that supposedly supported the availability of stacked UIM coverage at the relevant time, and plaintiffs cannot rely on ignorance of the law to support any fraudulent concealment argument.

Similarly, in *Raucci v. Roman,* 2008 WL 2622776 (D. Conn. June 26, 2008), the plaintiff alleged the defendant misrepresented the terms of a business transaction. The court rejected the plaintiff's contention that the limitations periods on his causes of action were tolled based on the defendant's alleged fraudulent concealment where, as here, the information was plainly available to the plaintiff in the contract between the parties:

> Lacking in the complaint is any allegation demonstrating concealment or that the particular misrepresentation asserted was unknowable to plaintiff. According to the complaint, plaintiff signed the contracts at issue, including his resignation as a director of the corporations. Plaintiff states that defendant was aware of his diagnosed disability [attention deficit/hyperactivity disorder] and that plaintiff had difficulty reading and comprehending documents. However, plaintiff does not allege that defendant concealed the contractual terms or prevented plaintiff from discovering the contents of contracts. Accordingly, the Court finds that plaintiff's allegations are not sufficient to state a claim of fraudulent concealment and will dismiss the complaint based on the bar of the relevant statutes of limitations.

Raucci, 2008 WL 2622776, *3 (citation omitted). *See also Cunningham v. Massachusetts Mut. Life Ins. Co.,* 972 F. Supp. 1053, 1056 (N.D. Miss. 1997) (holding that plaintiff who possessed clear information about the terms of a policy was not allowed to use fraudulent concealment to toll the statute of limitations).

Plaintiffs' allegation that they could not have known they were supposedly entitled to stacked coverage because the Adjuster Defendants "fraudulently concealed" this from them is further negated by the existence of West Virginia case law specifically addressing the availability of stacked UIM coverage, upon which plaintiffs' own counsel has repeatedly relied in other cases to claim there was a duty to stack during the relevant time period. In *Bell v. State Farm Mut. Auto. Ins. Co*, 157 W. Va. 623, 207 S.E.2d 147 (1974), *superseded by statute as stated in, Imgrund v. Yarborough*, 199 W. Va. 187, 483 S.E.2d 533 (1997), the West Virginia Supreme Court held that provisions limiting uninsured motorist coverage to the excess of the amount recovered by the insured under any other similar insurance available to the insured were void and ineffective, hence did not necessarily preclude stacking of uninsured motorist coverage. In *State Auto. Mut. Ins. Co. v. Youler*, 183 W. Va. 556, 396 S.E.2d 737 (1990), the West Virginia Supreme Court, *citing Bell,* held that anti-stacking provisions in a UIM policy were unenforceable on grounds of public policy if an insured obtained more than one policy from the insurer. The court noted that under these circumstances, anti-stacking language "thwarts the statutorily stated public policy of full indemnification." *Id*. at 564-65, 396 S.E.2d at 745-46. So, at the time of plaintiffs' accident, and shortly thereafter, West Virginia Supreme Court case law which, again, plaintiffs' counsel in this case has relied on in other contexts as clearly establishing the right to stack, existed and was in the public domain.[6]

It is well settled that all persons are presumed to know the law. *See, e.g., Hartley Hill Hunt Club v. County Com'n of Ritchie County*, 220 W. Va. 382, 391, 647 S.E.2d 818, 827 (2007) ("All persons are presumed to know the law"); *State v. McCoy,* 107 W. Va. 163, 172, 148 S.E. 127, 130 (1929) (same principle). For example, in *Hartley,* the court rejected the argument that ballot language for a county's local option election to determine whether to prohibit Sunday hunting on privately-owned land was misleading, stating: "A strained reading of the ballot language might create some

[6] The Adjuster Defendants dispute that these cases required stacking under the circumstances of plaintiffs' case. The point is, however, that these cases existed, were interpreted at the time, at least by the plaintiffs' bar, to require stacking, and were in the public domain.

ambiguity -- for instance, the ballot does not say that the election was to decide Sunday hunting *only on privately-owned land.* This ambiguity is tempered, however, when one considers that [a state statute] already barred Sunday hunting on public land. Because citizens are presumed to know the law, we must assume that Ritchie County voters knew that their vote did not apply to public land." 220 W. Va. at 391, 647 S.E.2d at 827 (emphasis in original, citations and footnote omitted). Indeed, citing this principle, the West Virginia Supreme Court has expressly held that a plaintiff's ignorance of the law will *not* toll the statute of limitations. *Merrill v. West Virginia Dept. of Health and Human Resources,* 219 W. Va. 151, 157-58, 632 S.E.2d 307, 313-14 (2006) (citing collected cases for the proposition that knowledge of the law is presumed and ignorance of the rights it grants and protects does not toll the statute of limitations).

The fact that plaintiffs were, at all relevant times, presumed to know the law – including the case law governing UIM stacking in West Virginia – further negates any contention that plaintiffs could not have discovered the supposed availability of stacked UIM coverage, as well as plaintiffs' allegation that the Adjuster Defendants somehow "fraudulently concealed" the availability of stacked UIM coverage from them. *See Merrill, supra*; *see also Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 1986 WL 957, **9-10 (S.D. W. Va. May 13, 1986), *aff'd,* 828 F.2d 211 (4th Cir. 1987) (rejecting plaintiff's fraudulent concealment argument where the information plaintiff allegedly was unable to discover within the applicable limitations periods was in the public domain and clearly accessible to plaintiff); *Stertz v. Gulf Oil Corp.,* 1988 WL 83188, *5 n. 2 (E.D.N.Y. July 22, 1988) ("Even if the court was to accept plaintiffs' contention that their cause of action did not accrue until they should have, with due diligence, discovered the alleged overcharges, it is clear that information sufficient to put the plaintiffs on notice was a matter of public record as of May 9, 1974. On that date, the Wall Street Journal published an article entitled ‘Gulf Is Charged by Energy Agency with Illegally Inflating Crude Prices.’ The plaintiffs certainly should have realized they had a claim against Gulf by that date”). As in *Merrill, supra,* plaintiffs simply cannot rely on ignorance of the law to support any sort of “fraudulent concealment” argument here.

Because all plaintiffs’ UTPA, bad faith, fraud and deceit claims are barred by the applicable limitations periods, these claims should be dismissed as against the Adjuster Defendants.

II. PLAINTIFFS’ COMMON LAW BAD FAITH CLAIM FAILS AS TO THE ADJUSTER DEFENDANTS BECAUSE THEY ARE NOT PARTIES TO THE INSURANCE CONTRACT AT ISSUE IN THIS MATTER.

Plaintiffs also cannot state a common law bad faith claim against the Adjuster Defendants. Because these Defendants are clearly not, and are not alleged to be, parties to the insurance contract between plaintiffs and Allstate, no common law bad faith cause of action exists against the Adjuster Defendants under West Virginia law.

In *Elmore v. State Farm Mut. Auto. Ins. Co.,* the West Virginia Supreme Court noted, "the common law duty of good faith and fair dealing in insurance cases under our law runs between insurers and insured's and is *based on the existence of a contractual relationship."* 202 W. Va. 430, 434, 504 S.E.2d 893, 896 (1998) (emphasis added). Consistent with this principle, the court, in *Grubbs v. Westfield Ins. Co*., 430 F. Supp. 2d 563, 567 (N.D. W. Va. 2006), found the defendant insurance adjuster in that case was an employee of the insurer and not a party to the plaintiff’s insurance contract, hence no common law bad faith claim could exist as to him.

The *Grubbs* court stated, in language equally applicable here: "because insurance adjusters are not parties to the insurance contract, no common law bad faith cause of action exists against [the defendant adjuster] under West Virginia law." *Id.* The court held that, "in the absence of both a duty arising from a contractual relationship and also a duty arising from statute, *there is simply nothing to support a common law duty of good faith and fair dealing on the part of insurance agents or adjusters towards insureds*." *Id.* (emphasis added, citation and internal quotation omitted).

Here, because the Adjuster Defendants are not, and are not alleged to be, parties to the insurance contract between plaintiffs and Allstate, plaintiffs' common law bad faith claim as to the Adjuster Defendants fails as a matter of law.

III. PLAINTIFFS' CLAIMS AS TO THE ADJUSTER DEFENDANTS ALSO FAIL BECAUSE THE COMPLAINT IS DEVOID OF ANY ALLEGATIONS OF SPECIFIC CONTACT BETWEEN PLAINTIFFS AND THESE DEFENDANTS.

In addition, plaintiffs' claims against the Adjuster Defendants fail because the Complaint is devoid of any allegations of specific contact between plaintiffs and these Defendants.

For example, in *Grennell v. Western Southern Life Ins. Co.*, 298 F. Supp. 2d 390 (S.D. W. Va. 2004), the plaintiffs alleged the defendant insurer and certain of its agents committed fraud in the sale of life insurance policies. The court found the non-diverse individual defendants were fraudulently joined because it was apparent that none of the plaintiffs had any contact with these defendants, and, in any event, the plaintiffs' allegations regarding any such contact failed to satisfy the particularity requirements of West Virginia Rule of Civil Procedure 9(b). *Id.* at 400-01. The court dismissed the claims as to those defendants on this ground. *Id.* at 400.

Similarly, in *Burns v. Western Southern Life Ins. Co*., 298 F. Supp. 2d 401 (S.D. W. Va. 2004), another case alleging that the defendant insurer and certain of its agents fraudulently sold life insurance policies, the court dismissed the claims against the individual defendants because the complaint was devoid of any specific allegations regarding any contact between plaintiffs and the relevant defendants. In so ruling, the court stated "[t]he Court further agrees . . . . that Plaintiffs failed to allege fraud with particularity against the individual Defendants. . . . Accordingly, the claims against the individual Defendants are DISMISSED." *Id.* at 403.

Here too, the Complaint fails to allege with particularity any specific contact or communications between plaintiffs and the individual defendants. Rather it only alleges plaintiffs "relied on the representation of Defendants Allstate, Larry D. Poynter and Ed Steen" that the UIM coverage available to plaintiffs was $100,000. (Complaint, ¶ 15.) The Complaint lumps all the defendants together, and does not allege with particularity what any particular defendant said or how or when this might have been communicated by that defendant to plaintiffs. As in *Grennell* and *Burns,* plaintiffs' claims against the Adjuster Defendants fail on this ground as well.

IV. PLAINTIFFS' LAWSUIT AGAINST THE ADJUSTER DEFENDANTS IS BARRED BY THE "TWO DISMISSAL RULE."

Plaintiffs' lawsuit against the Adjuster Defendants is also barred by the "two dismissal rule." Fed. R. Civ. P. 41(a)(1) allows a plaintiff to voluntarily dismiss his or her case by filing notice of dismissal before the opposing party files its answer or a motion for summary judgment, or by filing a stipulation between the parties as to the dismissal. Rule 41(a)(1) further states:

> Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

Fed. R. Civ. P. 41(a)(1)(B).

This provision, known as the "two-dismissal rule," allows a plaintiff to re-file the same claim following a voluntary dismissal only once before attaching prejudice to the action. *See, e.g., Manning v. South Carolina Dep't of Highway & Pub. Transp.,* 914 F.2d 44, 47 (4th Cir. 1990) (citing Rule 41(a)(1) and stating: "[b]ecause a notice of a second dismissal by the plaintiff serves as an 'adjudication on the merits,' the doctrine of *res judicata* applies"); *Wahler v. Countrywide Home Loans, Inc.*, 2006 WL 2882495 (W.D.N.C. Oct. 5, 2006) (same principle). The two-dismissal rule also applies to voluntary dismissals of actions filed in state court where, as here, the state has enacted its own version of the two dismissal rule and would therefore treat the second dismissal as a dismissal with prejudice. *Id.*

For example, in *Manning,* a dispute involving the alleged wrongful condemnation of the plaintiff's land, the plaintiff filed a suit in 1982 naming as defendants the Highway Department and other individuals involved in the condemnation proceeding. Deputy Attorney General Evans was not named in that complaint. The plaintiff voluntarily dismissed the suit on January 28, 1982. On June 5, 1985, he filed a state action naming Evans and other defendants alleging, inter alia, claims for violation of constitutional rights, conspiracy and fraudulent misrepresentation. On July 9, 1985, plaintiff voluntarily dismissed the individual defendants from that suit. On June 11, 1985, the plaintiff re-filed the case before the *Manning* court, naming as defendants the

State of South Carolina, the Highway Department and various individuals, including Evans. This action stated, inter alia, claims for constitutional violations, RICO violations, abuse of process, fraud and deceit. 914 F.2d at 46-47.

The district court ruled the plaintiff was foreclosed from pursuing Evans because he had voluntarily dismissed Evans from two previous actions (the 1982 federal court suit in which he had named as defendants Doe and Roe, but not Evans, and the 1985 state court suit which listed Evans as a defendant). The Fourth Circuit agreed, explaining that when a second dismissal occurs in state court, the two dismissal rule applies only if the state has enacted its own version of the two dismissal rule and would therefore treat the second dismissal with prejudice. The Court noted that South Carolina had adopted most of the language of Fed. R. Civ. P. 41(a)(1), so that the two dismissal rule applied. 914 F.2d at 48 n. 5. The Court rejected the plaintiff's argument that the rule should not apply on the ground that Evans was not named in the first suit, because the principle of "res judicata applies not only to named parties to an action, but also to their privies," and it was clear Evans' rights were implicated in the initial action. *Id.* at 48. Accordingly, the Court concluded the district court "did not err in considering Manning's dismissal of the action filed in January 1982 as the first of two dismissals of Evans as a defendant." *Id.*

Applying these principles in *Wahler,* the court noted that "North Carolina has enacted a rule of civil procedure virtually identical to Federal Rule of Civil Procedure 41(a)(1) which contains the two-dismissal rule." 2006 WL 2882495, *2 (citing Wright & Miller, *Federal Practice and Procedure:* Civil 2d § 2368 ("However if the state has a rule comparable to Rule 41(a)(1), the dismissal in state court would be an adjudication on the merits in the state court by virtue of the state rule and would bar, as would any adjudication on the merits, a new suit in a federal court")). In *Wahler*, the plaintiffs filed a counterclaim against the defendant, on March 10, 2004, during an original foreclosure proceeding in state court alleging, among other claims, that the loan transaction at issue "was rescindable and subject to the disclosure requirements of [the Truth in Lending Act]." *Wahler,* 2006 WL 2882495, *2. The plaintiffs subsequently withdrew their counterclaim on March 22, 2004, which the court found to be the same as a voluntary dismissal. On that same day, the plaintiffs filed a complaint in state court which was virtually identical to their original counterclaim. On August 19, 2004, the plaintiffs voluntarily dismissed that action. The court noted that, "[a]lthough this voluntary dismissal was the first time plaintiffs actually cited Rule 41, it was actually the second time they had voluntarily dismissed the same claim against the same defendant." *Id.*

Accordingly, the *Wahler* court held that "under both the Federal Rules of Civil Procedure and the North Carolina Rules of Civil Procedure, Plaintiffs' second voluntary dismissal of this claim against Defendant for failure to comply with the disclosure requirements of [the Truth in Lending Act] was a dismissal on the merits and with prejudice, and *res judicata* prevents further litigation of this claim." *Id.* Because, in the case before it, the plaintiffs were "once again filing a claim against Defendant for failure to comply with the disclosure requirements set out in [the Truth in Lending Act]," the court found the plaintiffs were filing "an action based on or including the same claim" as the previous actions, and that the action was barred under Rule 41(a)(1). *Id.*, *3.

Similarly, in *Gabhart v. Craven Regional Med. Ctr.,* 73 F.3d 537, 1995 WL 764240 (4th Cir. 1995) (unpublished decision), the Court noted that the case before it was the third action filed by Gabhart alleging he was wrongfully discharged. The previous two actions were filed in North Carolina state court and voluntarily dismissed. Noting that North Carolina had a two dismissal rule substantively identical to Fed. R. Civ. P. 41(a), the Court found the rule barred Gabhart's third action. In so ruling, the Court held that Gabhart's prior state court actions, while alleging different causes of action, involved the same underlying facts and were "fundamentally the same." *Id.,* *2. The Court also rejected Gabhart's argument that "the two dismissal rule does not apply unless the defendants were the same or in privity in both actions," and, in the "first suit, CRMC was the sole defendant, while in the second suit, three officers and employees of CRMC were the named defendants." *Id.* The Court explained that North Carolina's Rule 41(a) did "not include any requirement that both actions be against the same defendant." *Id.* Accordingly, the two dismissal rule barred Gabhart's third lawsuit, and the district court did not err in dismissing it on this ground. *Id.*

Applying the above case law here, the instant lawsuit is clearly barred by the two dismissal rule. As an initial matter, West Virginia has a two dismissal rule that is substantively identical to the federal rule. *See* W. Va. R. C. P. 41(a) ("Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of this or any other state an action based on or including the same claim"). Accordingly, as in the above cases, the two dismissal rule applies here.

On May 25, 1990, plaintiffs filed a lawsuit against Allstate, arising from the same automobile accident at issue in the instant case, based on Allstate's alleged failure to pay them the full amount of UIM benefits allegedly owed them, and they voluntarily dismissed Allstate from that lawsuit on September 5, 1990. *See* Complaint and Order of Dismissal in *Cumptan v. Couchenour,* No. 90-C-809, attached as **Exhibit "C"** hereto. On December 2, 2009, plaintiffs filed a second lawsuit against Allstate, this time also naming the Adjuster Defendants, substantively identical to the instant lawsuit, which they voluntarily dismissed on December 15, 2009. *See* December 2, 2009 Complaint and December 15, 2009 notice of dismissal in *Cumptan v. Allstate Insurance Company, Larry D. Poynter and Ed Steen,* Civil Action No. 09-C-247H, appended as Exhibit "D" to the Adjuster Defendants' Memorandum of Law in Support of Motion to Dismiss as filed on January 29, 2010. (Docket No. 7) and incorporated herein by reference. While certain of the causes of action may be different, it is clear that all three lawsuits here arise from the same facts and assert fundamentally the same claims -- *i.e.,* plaintiffs' alleged entitlement to additional UIM benefits. Put simply, as in all the above-cited authority, the "two dismissal" rule bars plaintiffs' current lawsuit.

Moreover, the fact that only Allstate, but not the Adjuster Defendants, was named in the original suit makes no difference. As with the individual defendant in *Manning*, who was not named in the original lawsuit in that case, the legal rights of the Adjuster Defendants, which turn on plaintiffs' alleged entitlement to additional UIM benefits, were clearly implicated in the original lawsuit. Moreover, like the North Carolina two dismissal rule at issue in *Gabhart, supra,* West Virginia's two dismissal rule does *not* include any requirement that both actions be against the same defendant. Rather, the Rule states that "a notice of dismissal operates as adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of this or any other state an action *based on or including the same claim*." *See* W. Va. R. C. P. 41(a) (emphasis added). Here, as noted above, the two dismissals plaintiffs filed were plainly "based on or including the same claim."

CONCLUSION

For all the foregoing reasons, defendants Larry D. Poynter and Ed Steen respectfully move this Court to enter an Order dismissing this action as to them with prejudice and without leave to amend.

LARRY D. POYNTER AND ED STEEN
By Counsel

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